United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7143

To be argued by
LEONARD A. SPIVAK

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P/S

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ALBERT BRICK,
Plaintiff-Appellant,

—v.—

CPC INTERNATIONAL INC.,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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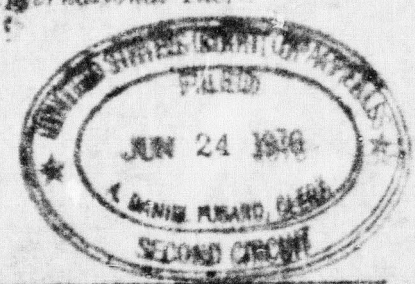

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Statement of the Issues

1. Whether the Order of Judge MacMahon denying plaintiff's motion for class action certification is appealable.

2. Whether an attorney who is the law partner of his counsel in an action brought as a class action, and who participates as an attorney in the prosecution of the action, can fairly and adequately protect the interests of the class, as required by Federal Rule of Civil Procedure 23(a)(4), in light of (i) the conflicting interests and duties, including his admitted interest in legal fees and his duty to act as a fiduciary on behalf of the class (for example, in evaluating the fairness of any proposed settlement), and (ii) the inevitable impression of improper solicitation and maintenance that such dual status creates.

3. Whether Judge MacMahon committed an abuse of discretion in denying plaintiff's motion for class action certification under all the circumstances of the instant action including specifically the fact that plaintiff, in submitting no legal authorities and proffering no facts to the District Court, failed to sustain his burden on the question of whether the action should be maintained as a class action.

4. Whether the Orders of Judge MacMahon denying plaintiff's motion to retransfer the action to the United States District Court for the District of Columbia are appealable.

5. Whether, in the event that the Orders denying retransfer are appealable, Judge MacMahon committed an abuse of discretion in denying that motion.

6. Whether plaintiff-appellant's appeal is frivolous, thereby justifying damages and single or double costs to defendant-appellee.

Statement of the Case

Nature of the Allegations Asserted

This action was filed as a class action in the United States District Court for the District of Columbia on July 26, 1974. The named plaintiff, Albert Brick, is an attorney. Both he and the class he purports to represent are represented in this action by Samuel Intrater, Esq. Mr. Intrater is Mr. Brick's sole law partner in the firm of Brick and Intrater. As set forth at pages 8-10, *infra*, the legal work performed in the prosecution of this litigation has been performed by Mr. Brick as well as Mr. Intrater. Moreover, Mr. Brick, the named plaintiff, has an

interest in any legal fees which may result from the successful prosecution or settlement of the litigation.

The complaint (Supp. App.* pp. 22-25) and amended complaint (App. pp. 1-4) allege, in conclusory fashion, violations of the Securities Exchange Act of 1934, Section 10(b) (15 U.S.C. § 78j(b) (1970)) and Rule 10b-5 (17 C.F.R. 240.10b-5 (1975)); Section 20 (15 U.S.C. § 78t (1970)); Section 27 (15 U.S.C. § 78aa (1970)); and Section 28 (15 U.S.C. § 78bb(a) (1970)), common law fraud and deceit and common law negligence, arising from the public offering under prospectus dated August 29, 1972 of seventy-five percent of the common shares of Funk Seeds International, Inc. ("Funk") which was, prior to the public offering, a wholly-owned subsidiary of the sole defendant, CPC International Inc. ("CPC"). The purported misrepresentations and omissions from the prospectus concern the termination of franchise-type contract agreements by certain Funk "associate" companies and the declaration of a dividend prior to the public offering at a time when Funk was still a wholly-owned subsidiary of CPC (App. pp. 1-2; see also Judge MacMahon's Memorandum filed February 23, 1976 denying plaintiff's motion for class action certification, App. pp. 173-74).

The purported class in this action was defined in the complaint as "others in the same or like or similar position or status in which plaintiff finds himself" (Supp. App. p. 22). The original complaint was also purportedly brought derivatively on behalf of Funk. Plaintiff's purported class was subsequently redefined in the amended complaint to include "all of the shareholders of Funk" (App. p. 1).

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* "Supp. App." refers to the Supplemental Appendix filed herein simultaneously with this Brief in accordance with leave granted to defendant-appellee by Order of Judge Van Graafeiland, June 11, 1976. References to the Appendix filed by plaintiff-appellant will be indicated "App."

Class Action Discovery of the Named Plaintiff; Judge Richey's Order of April 29, 1974

The proceedings below, as more fully evidenced by the dockets of the District Courts (Supp. App. pp. 1-6), included the production of documents by and deposition of the named plaintiff, both of which were limited solely to issues relevant to class action certification (App. pp. 61-172, Supp. App. pp. 26-54). Thereafter, CPC filed a motion to dismiss the complaint under Federal Rules of Civil Procedure 9(b) and 11, for partial summary judgment dismissing the class and derivative allegations of the complaint, and for an order restraining plaintiff and his law partner-counsel from further soliciting or otherwise communicating with members of the putative class (Supp. App. pp. 7-10). On April 29, 1974, an Order was entered by The Honorable Charles R. Richey, striking the derivative allegations of the complaint, enjoining plaintiff and his counsel from communicating with members of the putative class, permitting plaintiff to amend his complaint to further specify the remaining allegations, and denying the remainder of CPC's motion without prejudice to renewal as to any amended complaint (Supp. App. pp. 67-68).

The Filing of the Amended Complaint

After plaintiff filed an amended complaint* and a motion for class certification, CPC filed a motion to dismiss the amended complaint under Federal Rules of Civil Procedure 9(b) and 11 and opposed plaintiff's motion for class certification (Supp. App. pp. 69-80). On October 25, 1974, in an Order filed October 29, 1974, plaintiff was permitted—

* Plaintiff's amended complaint still retained the substantive claim encompassed by the very derivative allegations which Judge Richey had ordered stricken in his Order of April 29, 1974 (App. p. 2, Supp. App. pp. 74-75).

with CPC's consent—to amend the *ad damnum* clauses of the amended complaint, CPC's motion under Rule 9(b) was denied, and plaintiff's class action motion and CPC's Rule 11 motion were deferred pending a status call (Supp. App. pp. 82-83).

The Transfer of the Action to the Southern District of New York

After the status call, on October 31, 1974, Judge Richey *sua sponte* transferred the action to the Southern District of New York pursuant to 28 U.S.C. § 1404(a) for "the convenience of parties and witnesses, in the interests of justice" on various grounds including the pendency there of a related action entitled *Simon, et al.* v. *Funk Seeds International, Inc., et al.*, 74 Civil 645 (LFM) (Supp. App. pp. 84-85). On June 11, 1975, plaintiff moved to retransfer the action to the District of Columbia, which CPC opposed (Supp. App. pp. 86-94).

Disposition in the Court Below

The disposition in the court below was as follows: (i) by Orders filed and docketed August 5, 1975, Judge MacMahon denied plaintiff's application for retransfer (Supp. App. pp. 6, 95); and (ii) by Memorandum and Order filed February 23, 1976, Judge MacMahon denied plaintiff's motion for class certification (hereinafter referred to as "Judge MacMahon's opinion") (App. pp. 173-77).

Statement of the Facts

A. *The Relationship of Plaintiff and his Counsel and their Activities in Prosecuting this Action*

Plaintiff, a practicing attorney and member of the District of Columbia Bar, is the law partner of his counsel in the firm of Brick and Intrater (App. pp. 65-66). Plaintiff, who filed the complaint solely on the basis of a brief article in Forbes Magazine (App. pp. 79-80, 116, 119-20; see also Judge MacMahon's opinion p. 2, App. p. 174),* purchased 600 shares of Funk common stock in the open market on or about February 14, 1973 (Supp. App. pp. 22-23; see also Judge MacMahon's opinion p. 2, App. p. 174)—some five and one-half months after the date of the prospectus of which he purportedly complains. Mr. Brick testified that he did not obtain a copy of the prospectus (which was readily available to anyone) until after the lawsuit was instituted (App. pp. 147-48). This was plaintiff's only transaction in Funk stock (App. p. 145).

The plaintiff, Mr. Brick, is and for the past "eighteen or twenty years" has been the law partner of his counsel, Mr. Intrater, which "means that [he has] some arrangement for the sharing of fees with Mr. Intrater" (App. p.

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* The Forbes article contains nothing which would support an accusation of wrongdoing against CPC and makes no such accusation (Supp. App. pp. 55-56). It merely recites the occurrence of the special Funk dividend on July 16, 1972 (fully disclosed in the Funk prospectus) while Funk was a wholly-owned subsidiary of CPC, the public offering of August 29, 1972 and the termination notifications (in November and December, 1972) of the various Funk associates. As indicated in the Forbes article, not even Funk (much less CPC) had prior notice of the terminations. All of these events preceded Mr. Brick's acquisition of his Funk stock. See, *e.g.*, Funk's press release of January 8, 1973. (Sup. App. pp. 57-62; see also Judge MacMahon's opinion p. 2).

66). Mr. Brick testified under oath that it was "the law firm of Brick and Intrater that is representing [him]" in this action (App. pp. 102; see also App. pp. 106, 110-12, 122-125, 136). Mr. Intrater then interjected that he alone was representing his law partner, who promptly changed his testimony and adopted "absolutely" Mr. Intrater's suggestion (App. p. 13). Neither Mr. Brick nor Mr. Intrater were able to reconcile this, or other conflicts in plaintiff's deposition testimony, in light of the facts that (i) although he has separate stationery (App. p. 126), all of Mr. Intrater's correspondence in the case has been sent under the letterhead of "Brick and Intrater" (see, *e.g.*, Supp. App. p. 29); (ii) payment of various disbursements has come out of the funds of the Brick and Intrater firm (App. p. 106); (iii) most of the legal and factual work in this case (including the drafting of plaintiff's notice to produce documents and contacts with possible plaintiffs and witnesses) has been personally performed by Mr. Brick (a detailed list with references to the Brick deposition is set forth at pages 8-10, *infra*); and (iv) Mr. Brick will "absolutely" share in the attorneys's fee in this action "in accordance with [his] normal share of the partnership" if the Court permits him to do so (App. p. 107). Mr. Brick, in addition to acknowledging the existence of a general fee sharing arrangement with Mr. Intrater, confirmed that "there is not any understanding that he will *not* share in any fee that may be recovered by Mr. Intrater or Brick and Intrater" (App. pp. 66, 111). In addition, Mr. Intrater cautioned Mr. Brick and refused to allow him to respond to pertinent questions which would shed light on the precise nature of their fee sharing arrangement in this case (App. pp. 112, 171).

In his testimony, Mr. Brick repeatedly argued his inability to distinguish between his roles as lawyer and liti-

gant. Commenting on the various legal functions which he had performed, Mr. Brick stated, *inter alia*,

> "In a two-man firm I might say it is pretty hard to distinguish between one and the other. . . ." (App. p. 97).
>
> "[D]on't forget, there is a very slim line of demarcation between being a lawyer and being a party to the suit." (App. p. 100).
>
> "[T]he fact that I am a lawyer incidentally puts me in the spot I suppose of any lawyer who files a suit on behalf of himself could be accused of the same thing." (App. p. 101).

There were certain self-contradictions in Mr. Brick's testimony. When he was asked about his own work in connection with the action, Mr. Brick initially insisted that "I haven't prepared anything in connection with this case since the case started" and "that includes the drafting of papers" (App. pp. 73-74). In particular, Mr. Brick repeatedly insisted that he had not prepared plaintiff's Rule 34 notice to produce documents (Supp. App. pp. 32-35) stating that the document had been prepared by Mr. Intrater.* As a consequence of this denial, it was necessary to go through the tortuous course of establishing (a) that plaintiff's notice to produce had incorporated verbatim certain language from defendant's notice to produce (Supp. App. 26-28), and (b) that defendant's notice to produce was received and plaintiff's notice drafted and served during a time when Mr. Intrater was out of the country (App.

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* "Q. Now my question, Mr. Brick, is whether you prepared Defendant's Exhibit 6 [plaintiff's Rule 34 notice]?
"A. No, I did not." (App. p. 87).

* * *

"Q. He [Mr. Intrater] prepared Defendant's Exhibit 6?
"A. That is correct." (App. p. 91).

pp. 94-96). Faced with these facts, Mr. Brick reversed his prior testimony:

> "The Witness: I would like to say this: Come to think of this, I think I prepared this thing basically in toto, even though I had discussed it with Mr. Intrater previously.
>
> *"By Mr. McInerney:*
>
> "Q. That is Defendant's Exhibit 6?
> "A. Yes." (App. p. 97).

Moreover, Mr. Brick conceded that he has performed a plethora of legal functions relating to this litigation, including—

> (i) legal research following his reading of the Forbes article (App. pp. 74, 80-81, 119);
>
> (ii) factual research after the institution of this action,* including letters to Funk's president (App. pp. 98-100, 113, Supp. App. pp. 36-37), Funk's counsel (App. pp. 114-15, Supp. App. p. 38), Forbes Magazine (App. pp. 115-17, Supp. App. p. 39), oral and written communications with the SEC (App. pp. 121-24, 127-29, 131-33, Supp. App. pp. 42-44), and a letter to a lawyer on the staff of the Magnuson Committee (App. pp. 134-36, Supp. App. pp. 47-48);
>
> (iii) the drafting and sending of plaintiff's notice to produce documents (App. p. 97, Supp. App. pp. 32-35);

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* The "understanding" between Messrs. Brick and Intrater with respect to the litigation was that Mr. Intrater would handle the legal aspects and Mr. Brick would handle the factual aspects (App. pp. 112-13). Quite apparently, the understanding was not adhered to and Mr. Brick participated as a lawyer in both the legal and factual aspects of the case.

(iv) the drafting and sending of other legal communications to counsel for CPC (App. p. 69); including a letter on the letterhead of Brick and Intrater, dated November 29, 1973 (Supp. App. p. 29),* and a letter on the letterhead of Albert Brick, Esq. dated September 25, 1973 (Supp. App. p. 31); and

(v) communicating as an attorney with other potential class members (App. pp. 75-79, 136-38, 149-52, Supp. App. pp. 49-53) and communicating with and sending copies of pleadings to several law firms (App. pp. 138-39).

Mr. Brick testified that, in performing these functions, he was, *inter alia*, "acting as a lawyer", "moving the case along", "seeking what we lawyers call discovery" and "furthering the suit by seeking discovery" (App. pp. 93, 97, 98, 100). Mr. Brick acknowledged that his firm's clients do not normally draft or mail such things as notices to produce documents or communicate with the SEC or Congressional Committees (App. pp. 93, 167, 168).

Finally, Mr. Brick has also engaged in other legal activities of a more dubious propriety, including consultation with and solicitation of various potential litigants, and at one point asserted that he intended to continue this practice (App. pp. 150-53). Judge Richey's Order of April 29, 1974 prohibited any such further communications by plaintiff and his counsel (Supp. App. p. 67).

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* Mr. Brick denied that he wrote this document (App. pp. 73, 104), but his initials appear thereon as having dictated it. The appearance of Mr. Brick's initials indicate that it is probable that he wrote the letter (App. pp. 71-72, 132).

B. *The Transfer of this Action and Denial of Plaintiff's Motion to Retransfer*

This action was instituted in the United States District Court for the District of Columbia where the named plaintiff resides (App. p. 65). The action was transferred by The Honorable Charles R. Richey of that Court, *sua sponte*, pursuant to 28 U.S.C. § 1404(a) by Order dated October 31, 1974 (Supp. App. pp. 84-85). The facts support both the original order of Judge Richey and the denial, by Judge MacMahon on August 5, 1975, of plaintiff's motion to retransfer the action.

As Judge Richey held, this action could have been brought originally in the Southern District of New York (Supp. App. p. 84). CPC is located in Englewood Cliffs, New Jersey, adjacent to the Southern District of New York. Most of the CPC personnel who functioned on the Funk offering and who would be called as witnesses work in Englewood Cliffs and reside in or near the Southern District of New York. The underwriters involved in the public offering are located in the Southern District of New York. Most, if not all, of their representatives who may be called as witnesses work in and live in or near the Southern District of New York. Funk's headquarters are in Bloomington, Illinois and most of its personnel who may be called as witnesses work and reside in that vicinity. Other factors similarly indicate that the balance of convenience rests in New York and not in the District of Columbia (Supp. App. pp. 88-93).

Judge MacMahon, in denying retransfer by Orders filed and docketed August 5, 1975, also consolidated this action with *Simon* v. *Funk Seeds International, Inc., et al.*, 74 Civ. 645 (LFM) which was subsequently settled and ordered dismissed on January 19, 1976. Since that time, two additional related actions have been filed. One, an alleged

class action substantially identical to the instant action, was filed January 28, 1976 in the District of Columbia by Mr. Brick as plaintiff (again with his law partner as counsel) against CPC and 15 additional defendants. By Order dated March 18, 1976, granting defendants' motions to transfer the action pursuant to 28 U.S.C. § 1404(a), The Honorable Thomas A. Flannery transferred *Brick* v. *Funk Seeds International, Inc., et al.*, Civil Action No. 76-164, to the Southern District of New York where it has been assigned Civil Action No. 76-2123. In addition, a purported class action entitled *Burger* v. *CPC International Inc., et al.*, 76 Civ. 2106 (LFM) was filed in the Southern District of New York on May 11, 1976. Consequently, the interests of judicial economy found by Judges Richey and MacMahon continue to dictate the retention of this action in the Southern District of New York. Additionally, the statement contained in Appellant's Brief (p. 3), that there are no other related class actions pending, is obviously inaccurate.

ARGUMENT

Summary

Plaintiff has the burden of proof in demonstrating the appealability of both the denial of class action certification and the denial of his motion to retransfer this action to the District of Columbia. While plaintiff has failed to even discuss these issues, we submit that this Court has jurisdiction over the former order (under the "death knell" doctrine) but not over the latter. In any event, even if both of these orders were found to be properly within the appellate jurisdiction of this Court, plaintiff has failed to sustain his burden of proof on all the relevant factors in his motions before the District Court. Moreover, plaintiff has failed to demonstrate any abuse of discretion by the District Judge and CPC should be awarded damages and double costs on this frivolous appeal.

I

Appealability of Order Denying Class Action Certification

This Court must first deal with the question of the appealability of the order denying class certification. *Caceres* v. *International Air Transport Ass'n*, 422 F.2d 141, 142 (2d Cir. 1970). While Appellant's Brief totally ignores the question of appealability,* it does state that "Appellant's counsel thereupon informed the Court that appellant must take an appeal or else dismiss his action since it is not economically feasible for him to proceed on his individual claim" (p. 3). Plaintiff thus appears to invoke the "death knell" doctrine.

In his amended complaint, plaintiff asserts that the public offering of Funk shares at a price of $24 per share resulted in a total price to the public of approximately $60,000,000 (App. p. 1).** Plaintiff demands compensatory damages in the amount of $75,000,000 plus $100,000,000 in punitive damages on behalf of his putative class of an unspecified number of persons, plus costs and attorney's fees. Using plaintiff's own figures, and assuming he is serious about them (see Fed. R. Civ. P. 11), simple arith-

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* Plaintiff made no attempt to sustain his burden to demonstrate appealability under the controlling "death knell" doctrine. *Jelfo* v. *Hickok Mfg. Co.*, 531 F.2d 680 (2d Cir. 1976). It is submitted, however, that unlike the *Jelfo* case, the record of the instant action contains sufficient information to enable this Court to apply the appropriate standards. In addition, and in further contrast with *Jelfo*, the record conclusively shows the inappropriateness of class certification in this action.

** In response to CPC's notice to produce documents (Supp. App. 26-28) plaintiff produced a broker's confirmation slip indicating he purchased his 600 shares at $23.625. Plaintiff, however, never put his actual purchase price in the record.

metic results in a per share measure of alleged damages in the amount of $70. Plaintiff's 600 share purchase would, therefore, entitle him to $42,000 in damages. However, the better test of what plaintiff has at stake here is that, pursuant to a tender offer for Funk shares at $17 per share and a subsequent merger (Supp. App. p. 80), Ciba-Geigy Corp. now has the right to obtain 100% of Funk's shares, including those held by plaintiff. Thus, plaintiff's claims cannot realistically exceed some $4,200 (or $7 a share on his 600 shares).

In *Shayne* v. *Madison Square Garden Corp.*, 491 F.2d 397 (2d Cir. 1974), this Court held that an action having a potential recovery of $7,482 plus attorneys' fees was sufficient, under the particular facts there, to bar application of the "death knell" doctrine. That case is readily distinguishable from this, and we are aware of no decision in this Circuit denying application of the death knell doctrine in an action having a smaller potential recovery.

Accordingly, accepting the $4,200 figure, CPC submits that this Court has jurisdiction to entertain the appeal from the class action denial. The appealability of that order is further supported by the separability between the issues involved in the merits of the action and those underlying the propriety of the denial of class certification herein. See *Kohn* v. *Royall, Koegel & Wells*, 496 F.2d 1094, 1099 (2d Cir. 1974). As is demonstrated below, the grounds upon which class certification was denied herein are totally unrelated to the merits of the action.

II

Class Action Certification Was Properly Denied

A. *Plaintiff, who is the Law Partner of his Counsel and who is Actively Participating as an Attorney in the Prosecution of this Action, Cannot Fairly and Adequately Protect the Interests of the Purported Class*

1. Nature of the "Adequate Representation" Requirement

The "adequate representation" requirement of Federal Rule of Civil Procedure 23(a)(4)* is necessitated by the self-appointed fiduciary role volunteered for by the representative party and his counsel. As the Supreme Court stated in connection with a derivative action:**

> "[A] stockholder who brings suit on a cause of action derived from the corporation assumes a position, not technically as a trustee perhaps, but one of a fiduciary character. *He sues, not for himself alone, but as representative of a class comprising all who are similarly situated. The interests of all in the redress of the wrongs are taken into his hands, dependent upon his*

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* Rule 23(a)(4) provides:

> "(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . (4) the representative parties will fairly and adequately protect the interests of the class."

** The Court's rationale is at least equally applicable in class action situations. See, *e.g.*, *In re Value Line Special Situations Fund Litigation*, [1973-74 Transfer Binder] CCH Fed.Sec.L.Rep. ¶ 94,601, at 96,132 (S.D.N.Y. 1974) where Judge Tenney acknowledged the close relationship of the adequacy of representation requirements of Rules 23.1 and 23(a)(4).

> *diligence, wisdom and integrity.* And while the stockholders have chosen the corporate director or manager, they have no such election as to a plaintiff who steps forward to represent them. *He is a self-chosen representative and a volunteer champion.* The Federal Constitution does not oblige the state to place its litigating and adjudicating processes at the disposal of such a representative, at least without imposing standards of responsibility, liability and accountability which it considers will protect the interests he elects himself to represent." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 549-50 (1949).*

See also *Greenfield* v. *Villager Industries, Inc.*, 483 F.2d 824, 832 (3d Cir. 1973):

> "[I]n addition to the normal obligations of an officer of the court, and as counsel to parties to the litigation, class action counsel possess, in a very real sense, fiduciary obligations to those not before the court."

As a consequence of the fiduciary nature of the class representative role, the "courts have expressed particular concern" for this requirement and "carefully scrutinize the adequacy of representation in all class actions." *Eisen* v. *Carlisle & Jacquelin*, [*Eisen II*], 391 F.2d 555, 562 (2d Cir. 1968). See also *Gonzales* v. *Cassidy*, 474 F.2d 67, 76 (5th Cir. 1973). In *Bogus* v. *American Speech and Hearing Ass'n*, 20 Fed. Rules Serv.2d 859, 860 (E.D. Pa. 1975), the Court stated, "The qualifications, experience, and general ability of counsel are contingent on counsel's ability unstintingly to perform his fiduciary obligation to absent class members."

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* Emphasis added throughout except as otherwise indicated.

2. The Inherent Conflict of Roles of the Attorney-Plaintiff

In judging the ability of a volunteer class representative to act in that fiduciary capacity, many courts have held that there is an irreconcilable conflict of interest, which precludes a finding of adequate representation, when the roles of plaintiff and counsel become entangled.

The nature of this conflict was spelled out by Judge Friendly for this Court in a derivative action, *Saylor* v. *Lindsley*, 456 F.2d 896, 900 (2d Cir. 1972):

> "There can be no blinking at the fact that the interests of the plaintiff in a stockholder's derivative suit and of his attorney are by no means congruent. While, in a general sense, both are interested in maximizing the recovery this is only a half-truth. Even apart from special considerations which, as has been noted, may cause special divergence of interest in cases where extremely large amounts are at stake, . . . there is a difference in every case. The plaintiff's financial interest is in his share of the total recovery less what may be awarded to counsel, *simpliciter;* counsel's financial interest is in the amount of the award to him less the time and effort needed to produce it. A relatively small settlement may well produce an allowance bearing a higher ratio to the cost of the work than a much larger recovery obtained only after extensive discovery, a long trial and an appeal [citations omitted]."

The foregoing concepts were recently applied by the Court of Appeals for the Sixth Circuit in *Taroff* v. *May Co.*, 531 F.2d 1357, 1360 (6th Cir. 1976) in which denial of class status was affirmed for precisely the same reason as Judge MacMahon denied class action status in the instant litigation:

> "For the same individual to attempt representation of the class as plaintiff and as counsel presents an inherent conflict of interests. Because the financial recovery for reasonable attorney's fees would dwarf the individual's recovery as a member of the class herein, the financial interests of the named plaintiffs and of the class are not co-extensive. If the interests of a class are to be fairly and adequately protected, if the courts and the public are to be free of manufactured litigation, and if proceedings are to be without cloud, the roles of class representative and of class attorney cannot be played by the same person."

See also *Graybeal* v. *American Savings & Loan Ass'n*, 59 F.R.D. 7 (D.D.C. 1973), where a putative class action had been brought by a husband and wife with the husband as one of the attorneys seeking to represent the plaintiff class. Denying class action status, the Court held that the plaintiffs could not "adequately protect the interests of the proposed class while concurrenly acting as attorneys for the class in the same action." 59 F.R.D. at 12. With respect to the overlapping of the roles of litigant and lawyer, and the resulting conflicts, the Court found:

> "[Plaintiffs] have failed to demonstrate to the Court's satisfaction that they will fairly and adequately protect the interests of the class. *Plaintiffs have placed themselves in the dual roles of attorneys for, and representatives of, the proposed class. These dual roles are inherently fraught with potential conflicts of interests.* In any class action there is always the temptation for the attorney for the class to recommend settlement on terms less favorable to his clients because a large fee is part of the bargain. The impropriety of such a position is increased where, as here,

the attorney is also the representative who brought the action on behalf of the class, ..." 59 F.R.D. at 13-14.

In *Platt* v. *B.P. Oil Corp.*, 72 Civ. 651, Unreported Decision (S.D.N.Y. Nov. 19, 1973), Judge Gagliardi denied class action status on the ground, *inter alia*, that:

> "the plaintiff has not sufficiently demonstrated his ability to adequately represent the proposed class. *The plaintiff, an attorney, is represented by his partner in the two-man firm of Levy & Platt, Esqs. The potential conflicts inherent in such representations are obvious.*" at 6.

To the same effect, see *Cotchett* v. *Avis Rent A Car System, Inc.*, 56 F.R.D. 549, 554 (S.D.N.Y. 1972), where Judge Tyler, presented with a would-be class representative who was also co-counsel in the action, denied class action status, noting:

> "The difficulty I have with this situation lies in the fact that the possible recovery of Mr. Cotchett as a member of the class is far exceeded by the financial interest Mr. Cotchett might have in the legal fees engendered by this lawsuit . . . .
>
> "Thus, it may well be '. . . that plaintiff has interests antagonistic to those of the remainder of the class.'"

Other courts have also denied representative status to plaintiffs in alleged class actions in similar situations. See, *e.g.*, *In re Hotel Telephone Charges*, 500 F.2d 86, 91 (9th Cir. 1974); *Seiden* v. *Nicholson*, 69 F.R.D. 681, 687 (N.D. Ill. 1976); *Holland* v. *Goodyear Tire & Rubber Co.*, 1975-2 Trade Cas. ¶ 60,522 (N.D. Ohio 1975); *Dennis* v. *Saks & Co.*, 1975-2 Trade Cas. ¶ 60,396, at 66,748 (S.D.N.Y. 1975); *Stull* v. *Pool*, 63 F.R.D. 702 (S.D.N.Y. 1974); *Shields*

v. *First National Bank*, 56 F.R.D. 442 (D.Ariz. 1972); *Shields* v. *Valley National Bank*, 56 F.R.D. 448 (D.Ariz. 1971); *Kriger* v. *European Health Spa, Inc.*, 56 F.R.D. 104 (E.D.Wisc. 1972); *Eovaldi* v. *First Nat'l Bank of Chicago*, 57 F.R.D. 545, 546 (N.D.Ill. 1972); *cf. Berkman* v. *Sinclair Oil Corp.*, 59 F.R.D. 602, 610 (N.D. Ill. 1973).

3. The Appearance of Impropriety Engendered by the Attorney-Plaintiff Relationship in a Class Action

The appearance of impropriety arising out of the dual attorney-plaintiff role in a class action was recently expressed by the Court of Appeals for the Third Circuit in *Kramer* v. *Scientific Control Corp.*, —— F.2d ——, Nos. 75-1673, 75-1849 (3d Cir. April 20, 1976). In that action (as contrasted to the instant action), the attorney-plaintiff had testified that he would not accept any portion of any court-awarded fee. The Court acknowledged that position, but nevertheless stated:

> "Clearly he perceived that he could be accused of a conflict of interest were he to anticipate a share of the potential court-awarded attorneys' fee in addition to his recovery as a member of the class.
>
> "Appellee Kramer also demonstrated an awareness of fealty to the spirit of Canon 9 of the Code of Professional Responsibility: 'A Lawyer Should Avoid Even the Appearance of Professional Impropriety.' Given the possible conflict of interest between the class member plaintiff *qua* plaintiff and the class member plaintiff *qua* counsel, under circumstances in which an equitable fund may be created from which an attorneys' fee may be awarded, we agree that *a plaintiff class representative could not, with complete fidelity to Canon 9, serve as class counsel*." at 9.

The Court further found the plaintiff's associate could not act as counsel for the class:

> "[I]t is the *appearance*, not the *fact*, of impropriety which Canon 9 is designed to eliminate. [Emphasis by the Court].
>
> "As Ethical Consideration 9-2 of the Code of Professional Responsibility cautions in part, '[o]n occasion, ethical conduct of a lawyer may appear to laymen to be unethical.' Laymen generally understand basic partnership attributes. The word 'partner' has a meaning among the laity that does not vary substantially from its jurisprudential ramifications. Implicit in the term is a sharing of profits and losses. Esoteric internal protections in writing or under oath, insulating the plaintiff-attorney partner from participating in a fee, can hardly dissipate the lay notion that action by one partner is action for the partnership. Accordingly, we cannot agree that an appearance of an improper conflict of interest inherent in one partner's dual role as class representative and as class counsel vanishes when his partner is substituted as class counsel. To argue as appellees do is to argue against reality, against the vagaries of human nature, and against widely-held public impressions of the legal profession. *Thus, if one concludes, as we do, that an appearance of impropriety, at a minimum, ensues when an attorney class representative also serves as counsel for a class that may benefit from an equitable fund, substituting a partner as counsel will not suffice as an antidote.* If we are to provide force and vigor to Canon 9, a prophylactic rule prohibiting appointment of a partner as counsel is mandated in such circumstances." at 12-13.

Other courts have acknowledged the unsavory light cast upon the legal profession by the attorney-plaintiff in class action situations. In *Shields* v. *First National Bank, supra*, the Court observed that commingling of the roles of class representative and counsel "does not seem to the court to comport with the high quality of objectivity, duty and integrity required of lawyers practicing in this court or elsewhere." 56 F.R.D. at 444. See also *Turoff* v. *May Co., supra.*

In short, when there is an entangling or commingling of the attorney's role and that of the representative plaintiff, the "adequate representation" requirement of Fed. R. Civ. P. 23(a)(4) cannot be satisfied. This is especially so where, as here, the volunteer representative is represented by his only law partner. As Judge Tyler noted in a different context, public policies dictate that even the "appearance of impropriety" must be avoided in order to establish "public confidence in the integrity of the judicial process." *Handelman* v. *Weiss*, 368 F.Supp. 258, 264 (S.D. N.Y. 1973).

Thus, in *Alpine Pharmacy, Inc.* v. *Chas. Pfizer & Co.*, 481 F.2d 1045, 1050 (2d Cir. 1973), Judge Smith of this Court noted that an attorney involved in a class action litigation:

> "shares with the court the burden of protecting the class action device against public apprehensions that it encourages strike suits and excessive attorneys' fees. *See* 7A C. Wright & A. Miller, supra, at § 1803."

In *Liebman* v. *J. W. Petersen Coal & Oil Co.*, 63 F.R.D. 684, 701 (N.D.Ill. 1974), the Court observed:

> "The principal attacks on the rule [Fed. R. Civ. P. 23] are largely the result of conduct by counsel for plain-

tiffs in some cases who have acted as though the rule was adopted for their benefit rather than for the multitude of individuals comprising the class or classes whose rights they were presumably vindicating."

From the foregoing authorities, one cardinal rule emerges—in order to avoid conflicts of interest and possible violation of fiduciary duty, the roles of representatives litigant and counsel must be kept entirely separate and distinct or there can be no finding of "adequate representation." The rule applies with equal force where a named-plaintiff who is an attorney would be represented by his partner in the practice of law.

B. *Plaintiff and his Counsel Are Not Otherwise Proper Class Representatives*

1. Plaintiff Utterly Failed to Sustain his Burden of Proof in Support of his Class Action Allegations—No Legal or Factual Arguments were Proffered by Plaintiff

It is axiomatic that a would-be class representative has the burden of proving (by facts, not unsupported allegations) that all the requisites of Rule 23 have been satisfied before he or she will be permitted to maintain an action as a class action and to represent the putative class. *Free World Foreign Cars, Inc.* v. *Alfa Romeo*, 55 F.R.D. 26, 29 (S.D.N.Y. 1972); 7A Wright & Miller, *Federal Practice and Procedure* § 1798, at 244 (1972). As Judge MacMahon concluded—and as supported by the record (or lack thereof) herein—plaintiff and his counsel failed utterly in sustaining this burden. There was no legal or factual authority presented in support of plaintiff's motion. Plaintiff never presented even a single affidavit in support of

his conclusory class action allegations or cited so much as a single case.*

At most, plaintiff's counsel compiled a series of generalized, vague and unsupported assertions which cannot meet the requirements of Rule 23. *DeMarco* v. *Edens*, 390 F.2d 836, 845 (2d Cir. 1968). See also *Cash* v. *Swifton Land Corporation*, 434 F.2d 569 (6th Cir. 1970). As Judge Gurfein stated in *Professional Adjusting Systems* v. *General Adjustment Bureau, Inc.*, 64 F.R.D. 35, 38 (S.D.N.Y. 1974), "It should take more than *ipse dixit* to make a class." For all plaintiff's protestations, he never adequately substantiated his compliance with the requirements of Rule 23. "The phrase 'similarly situated' is not magic." *Considine* v. *Park National Bank*, 64 F.R.D. 646, 647 (E.D.Tenn. 1974). As Chief Justice Battisti stated in *Holland* v. *Goodyear Tire & Rubber Co., supra*:

> "Given the complex nature of most class actions, and the expenditure of judicial resources incident to their administration, it is not altogether surprising that courts have refused to grant class action certification absent a clear showing by plaintiff that the provisions of Rule 23 F.R.Civ.P. have been fully complied with."

See also Judge Weinfeld's opinion in *Free World Foreign Cars, Inc.* v. *Alfa Romeo, supra*:

> "The machinery of the Rule [23], with its attendant expense, should not be brought into play unless initially plaintiff, who has the burden of proof, justifies its application."

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* Judge MacMahon stated: "Moreover, to the extent we must assess counsel's ability and diligence to prosecute the suit as a class action, we note that plaintiff has not supplied this court with any factual or legal argument in support of his motion." (App. p. 175)

One of the decisive elements courts look for in determining whether a particular party may be permitted to act as a class representative is whether that party has demonstrated sufficient interest to convince the court that he will prosecute the action with the required "forthrightness and vigor." *Kriger* v. *European Health Spa, Inc., supra,* 56 F.R.D. at 105-106. In *Mersay* v. *First Republic Corporation of America,* 43 F.R.D. 465, 469-70 (S.D.N.Y. 1968), Judge Metzner stated:

> "The proper inquiry is not merely whether plaintiff is a suitable representative, in that his background and relationships might defeat his recovery, but whether he will in fact adequately protect class interests."

Judge Metzner further stated:

> "These authorities indicate clearly that the primary criterion is the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class, so as to insure them due process." *Ibid.*

See also *Fendler* v. *Westgate-California Corp.,* 527 F.2d 1168, 1170 (9th Cir. 1975), "One of the criteria for adequacy of representation would appear to be the zeal and competence of the counsel and party who wish to prosecute the action."

Here, plaintiff and his counsel completely failed to provide any evidence or to make any effort to sustain their burden on the class action question. In addition, they have continually ignored basic rules of procedure even on this appeal (see page 39, *infra*). Such conduct necessitated the filing by CPC of a motion for leave to file the Supplemental Appendix and for other relief.

2. The Activities of Plaintiff and his Counsel Demonstrate their Inability to Adequately Represent the Purported Class

a. The Apparent Solicitation Efforts Engaged in by Plaintiff and his Counsel

The potential for abuse of the class action by attorneys, and solicitation in particular, has been widely recognized in recent years. "The class action under Rule 23 is subject to abuse, intentional and inadvertent, unless procedures are devised and employed to anticipate abuse." *Manual for Complex Litigation* § 1.41, at 11 (CCH 1973). The major abuses are "unreasonable charges for attorneys' fees and expenses" and "improper solicitation of legal representation" *Id.* § 1.47, at 28.

These abuses have been widely recognized by the courts. For example, in *Sherman* v. *H&R Block, Inc.*, 354 F.Supp. 1405, 1407 (E.D.Pa. 1973), the Court noted:

> "Since the 1966 amendments, F.R. 23 and 23(b)(3) in particular have been used more and more frequently as a device to solicit litigation and as a means for an attorney to achieve his 'pot of gold.' The number of class action complaints filed has soared, and the original object of the rule—judicial economy—seems to have been forgotten."

See also *Buford* v. *American Finance Co.*, 333 F.Supp. 1243, 1251 (N.D.Ga. 1971):

> "[T]he plain truth is that in many cases Rule 23(b)(3) is being used as a device for the solicitation of litigation. This is clearly an 'undesirable result' which cannot be tolerated."

To the same effect, see *Carlisle* v. *LTV Electrosystems, Inc.*, 54 F.R.D. 237, 239 (N.D. Tex. 1972). There, an attorney who was not a named plaintiff but was a member of the class solicited others to serve as the class representatives. This involvement by the attorney was a factor in the denial of class status. See also *Kline* v. *Coldwell, Banker & Co.*, 508 F.2d 226, 238 (9th Cir. 1974) (concurring opinion).

Here, Mr. Brick has written to others to stir up interest in his litigation and has testified to oral contacts with one or more members of the alleged class in which he solicited participation in the instant suit (see page 10, *supra*). He also stated, in his response to defendant's Rule 34 request and his testimony, that he intended to contact other Funk stockholders to ascertain whether they wished to join his suit (App. pp. 150-52, Supp. App. p. 30). These activities led to the entry by Judge Richey of his Order of April 29, 1974 prohibiting plaintiff and his counsel from communicating with members of the putative class.

b. *Other Indicia of Inadequate Representation*

As Judge MacMahon noted, plaintiff's testimony is likely to be necessary because of the circumstances regarding the timing of his purchase of Funk common stock (App. p. 175). This subjects Mr. Brick to a further ethical disability in his dual role as attorney and purported class representative. Disciplinary Rule 5-101 of the American Bar Association Code of Professional Responsibility provides:

> "(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or *it is obvious that he or a lawyer in his firm ought to be called as a witness. . . .*"

None of the exceptions to DR 5-101(B) are applicable here, and it is, indeed, obvious that Mr. Brick, the party plaintiff, will be a witness. He was represented at his deposition by Mr. Intrater, with the interesting results noted above. Moreover, the authorities are legion that when one partner of a law firm is ethically barred from accepting an employment, other members of the firm are similarly barred. ABA, Professional Ethics Formal Opinion No. 342, n.2 (Nov. 24, 1975).

In *Kriger* v. *European Health Spa, Inc., supra*, 56 F.R.D. at 105-106, the Court stated:

> "All parties agree that a burdensome ethical question would be raised if the plaintiff were to be called as a witness while his firm is employed in the matter. The plaintiff responds that he can pursue the matter without testifying, or, if he should be required to testify, his employers can withdraw as counsel. I find the latter solution unsatisfactory. A person wishing to represent a class must be able to demonstrate 'the forthrightness and vigor . . . which the representative party can be expected to assert.' . . . *This plaintiff has commenced an action under the disability that no other member of the class is likely to have*, an inability to testify except at the cost of withdrawal of counsel familiar with the case from its inception. *It is not enough to say that his testimony may not be needed; the possibility of such a need makes him less capable of adequate representation than others in the class* [citations omitted]."

C. *Plaintiff's Arguments on Appeal Do Not Support Reversal of Denial of Class Certification*

As plaintiff himself recognizes (Appellant's Brief p. 4), the District Court did not base its denial of class action status on any misconduct on the part of plaintiff's counsel. As is clear from the face of Judge MacMahon's decision the two alternative grounds for denying the motion were (i) the inherent conflict of interest arising from Mr. Brick's dual role as would-be class representative and as an attorney representing the class, and (ii) the failure of the plaintiff to supply any factual or legal arguments in support of his class determination motion.*

Thus the two authorities cited in Appellant's Brief are totally irrelevant and are of no assistance in determining the issues on this appeal. Neither *Halverson* v. *Convenient Food Mart, Inc.*, 458 F.2d 927 (7th Cir. 1972), nor *Korn* v. *Franchard Corp.*, 456 F.2d 1206 (2d Cir. 1972),** con-

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* In this connection, Judge MacMahon referred to his assessment of "counsel's ability and diligence to prosecute the suit as a class action." This is a factor which has been considered by other courts. In *Felton* v. *Walston & Co.*, 73 Civ. 2200, Unreported Decision (S.D.N.Y. March 29, 1974), Judge Bonsal noted that the attorney-plaintiff was a practitioner in the negligence field rather than in securities or class action litigation. In its opinion on the appeal from Judge Bonsal's decision, *Felton* v. *Walston & Co.*, 508 F.2d 577 (2d Cir. 1974) (which did not involve the question of class determination) this Court noted its "apprehension for the reasons stated by Judge Bonsal in his opinion, regarding plaintiff Felton's qualifications to protect the interest of the class which he seeks to represent." 508 F.2d at 582 n.8. See also *O'Connor* v. *G.C.A. Corp.* [1973 Transfer Binder] CCH Fed.Sec.L.Rep. ¶ 94,057, at 94,254-55 (S.D.N.Y. 1973), wherein Judge Tyler found a tax attorney to be inadequate counsel for a purported class in a securities litigation.

** Appellant appears to have confused the only two authorities he cited in his Brief (p. 4). It was in the *Korn* case that counsel was not provided adequate notice and hearings on charges of

cerned the attorney-plaintiff conflict which dominates the instant action. Moreover, the plaintiffs' counsel in *Halverson* was found to have committed a "slight breach of ethics" in contacting the individual members of his client, an unincorporated association, to invite their participation in the proposed class action. The Seventh Circuit found that the attorney could reasonably have believed that each member was his client. 458 F.2d at 930-31. In the *Korn* case, a "significant operative change" occurred following the District Court's ruling—the offending plaintiff's counsel withdrew from all connection with or participation in the litigation. 456 F.2d at 1208. Plaintiff's counsel has never even suggested such a change in the instant action.

Ethical questions may properly be weighed in determining the appropriateness of the representative action. Violations of ethical standards may, in certain circumstances,* preclude a finding of adequate representation under Rule 23(a)(4) and result in a denial of class certification. See, *e.g.*, *Ash* v. *Brunswick Corp.*, [1974-75 Transfer Binder] CCH Fed.Sec.L.Rep. ¶ 95,109, at 97,950 (D. Del. 1975); *Stavrides* v. *Mellon Nat'l Bank & Trust Co.*, 60 F.R.D. 634, 636 (W.D.Pa. 1973); *O'Connor* v. *G.C.A. Corp.*, *supra*; *Jarblum* v. *Frigitemp Corp.* [1973 Transfer Binder] CCH Fed.Sec.L.Rep. ¶ 94,009 (S.D.N.Y. 1973);

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misconduct. 456 F.2d at 1208 n.4. Here there were no charges of misconduct (other than CPC's motions to dismiss on Fed. R. Civ. P. 11 grounds) and plaintiff's papers, devoid of any facts or legal authorities, provide more than an adequate basis for the Court's observation.

* For example, where the class action is the result of solicitation efforts and, but for such efforts, there would not have been a class action, denial of class action status would appear to be appropriate. Minor infractions by counsel of course should not necessarily result in denial of class action treatment. Rather, it is a matter of degree, to be determined by the circumstances of each case.

Ruggerio v. *American Bioculture, Inc.*, 56 F.R.D. 93, 95 (S.D.N.Y. 1972); *Taub* v. *Glickman*, 14 Fed. Rules Serv. 2d 847 (S.D.N.Y. 1970).

As demonstrated above, and in Judge MacMahon's opinion itself, the District Court was provided with ample grounds upon which it properly denied class certification. The belated attempts of plaintiff's counsel to prove his "experience and ability as a trial lawyer" is to no avail. By order of Judge Van Graafeiland dated June 11, 1976, the extraneous and irrelevant letter presented to this Court was stricken from plaintiff's Appendix. The similar references presented in Appellant's Brief are also outside the record (pp. 3, 4). As Professor Moore states, "of course, a party cannot simply file an *ex parte* statement in the district court after judgment in extenuation of his conduct there and have it considered as part of the record on appeal." 9 J. Moore, *Federal Practice* ¶ 210.04[1], at 1613 (2d ed. 1975). Unsupported statements in an appeal brief are equally ineffective.

The standard of review of a class action ruling is whether the District Court Judge abused his discretion. This action is not one of the unlikely few in which the lower court's order was so "egregiously erroneous" as to constitute an abuse of discretion. See *Parkinson* v. *April Industries, Inc.*, 520 F.2d 650, 655 (2d Cir. 1975). Plaintiff has failed to indicate any semblance of an abuse of discretion by Judge MacMahon and the denial of class certification should be affirmed.

III

The Order Denying Plaintiff's Motion to Retransfer the Action is Not Appealable

A. *The Attempted Appeal of the August 5, 1975 Orders is Far Outside the Proper Time and is Not Within the Jurisdiction of this Court*

On August 5, 1975, Judge MacMahon, in two separate orders (Supp. App. pp. 6, 95) denied plaintiff's motion to retransfer this action to the District of Columbia. The first indication ever given by plaintiff of his intention to appeal that ruling was contained in the Civil Appeal Pre-Argument Statement Form C filed by plaintiff with this Court on March 30, 1976. The Notice of Appeal, filed March 22, 1976 makes no reference to the separate and unrelated earlier Orders denying the plaintiff's motion to retransfer.

Federal Rule of Appellate Procedure 4 provides:

> "In a civil case . . . in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from. . . ."

Aside from the fact, demonstrated below, that an appeal is not permitted by law as of right from the August 5 orders, the first "notice" of the appeal from those orders was given over six months following the date of entry of Judge MacMahon's orders.

In attempting to obtain review of the Orders denying the motion to retransfer, and totally failing to sustain his

burden to show the appealability thereof, plaintiff ignores the plain language of this Court in *D'Ippolito* v. *American Oil Co.*, 401 F.2d 764 (2d Cir. 1968) (per curiam), which dismissed for lack of jurisdiction an appeal from a transfer order pursuant to 28 U.S.C. § 1404(a), stating:

> "While we granted the motion in open court, it seems desirable *to issue this opinion in the interest of eliminating similar appeals in the future.*" 401 F.2d at 764.
>
> "There is simply no basis for thinking that, despite twenty years of judicial construction that orders under § 1404(a) *can be reviewed only by mandamus* and then, where the order is within the court's power, on a most restricted basis, one type of order under § 1404(a) has been appealable all along." 401 F.2d at 765.

Although this Court could "treat the appeal as a petition for mandamus" (*Magnetic Engineering & Mfg. Co.* v. *Dings Mfg. Co.*, 178 F.2d 866, 869 (2d Cir. 1950)), plaintiff would be in no better position. Mandamus will not issue with respect to orders resting in the district court's discretion except in the most extraordinary circumstances. *Weight Watchers of Philadelphia, Inc.* v. *Weight Watchers International, Inc.*, 455 F.2d 770, 775 (2d Cir. 1972). In a transfer situation, mandamus may be appropriate if a question is presented regarding the transferor court's *power* to transfer.* No such question exists here. (Appellant's Brief, p. 5). Finally, even a properly brought mandamus petition at this late date should be rejected as being untimely. See *Farrell* v. *Wyatt*, 408 F.2d 662, 664 (2d Cir. 1969):

> "Even where the issue is lack of power, those attacking a transfer order should move swiftly for interim relief

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* See *Aaacon Auto Transport, Inc.* v. *Ninfo*, 490 F.2d 83 (2d Cir. 1974).

> rather than allow two months to go by, as here, before seeking to set it aside."

Appellant has, understandably, failed to provide even an implication of any support for this Court's jurisdiction to entertain an appeal of the Order denying his motion to retransfer.

B. *Any Jurisdiction of this Court Over the Appeal of the Class Action Ruling Does Not Support the Appeal on the Retransfer Question*

Even if the class action order is found to be within the jurisdiction of this Court, that provides no basis upon which appealability of the transfer ruling may be sustained by the concept of pendent appellate jurisdiction. As Chief Judge Kaufman stated for this Court in *General Motors Corp.* v. *City of New York*, 501 F.2d 639, 648 (2d Cir. 1974):

> "The guiding principle to inform the discretionary application of pendent jurisdiction is whether review of the appealable order will involve consideration of factors relevant to the otherwise nonappealable order."

As in the *General Motors* case,* the only arguably appealable order would be within this Court's jurisdiction under the principles enunciated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), which underlies the "death knell" doctrine. The "otherwise nonappealable order" herein, as in *General Motors*, is one wholly within the District Court's discretion. Consequently, the appealability of the class ruling herein cannot support jurisdiction for an appeal from the denial of the retransfer motion, for "it is

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* In *General Motors*, the order regarding attorney disqualification was the properly appealed issue whereas the class action ruling was not appealable on its own basis.

transparently obvious that no such overlap [of relevant factors] exists" between those two orders. 501 F.2d at 648.

In the event that a final judgment is ultimately presented on appeal, this Court will be in a better posture to review the propriety of the denial of retransfer. As Judge Waterman wrote in his discussion of the finality rule and its goals (which include "the elimination of delays and the conservation of judicial energy") in *Parkinson* v. *April Industries, Inc., supra,* 520 F.2d at 652:

> "The opportunity given the reviewing court to view the entire controversy with the perspective the completed proceedings provides enhances the likelihood of sound review."

Review of the denial of retransfer herein, thus, must await appeal from the final judgment. *D'Ippolito* v. *American Oil Co., supra,* 401 F.2d at 765.

IV

Retransfer Was Properly Denied

In the event that this Court determines the denial of plaintiff's motion to retransfer to be properly presented, CPC submits that there has been no semblance of a showing of any abuse of discretion by Judge MacMahon. The facts surrounding retransfer are presented above at pages 11-12.

The statute pursuant to which Judge Richey transferred this action to the Southern District of New York provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a).

Judge MacMahon was presented with substantial facts justifying the retention of this action in his Court (Supp. App. pp. 88-94). Appellant provided no compelling arguments supporting his retransfer motion (Supp. App. pp. 86-87). Judge MacMahon's two Orders of August 5, 1975 reflect his proper exercise of discretion to retain the action (Supp. App. pp. 6, 95).

The arguments presented in Appellant's Brief are of minimal consequence. Appellant's assertion that this action "would have been subject to dismissal under the doctrine of Forum Non Conveniens" had it been filed in the Southern District of New York initially is meritless. As the the Revisor's Note to 28 U.S.C. § 1404(a) states:

> "Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, *permitting transfer to a more convenient forum, even though the venue is proper.*"

Moreover, a lesser showing of inconvenience is required for transfer under § 1404(a) than was required for dismissal under the doctrine of forum non conveniens. *Schneider* v. *Sears*, 265 F.Supp. 257, 262 (S.D.N.Y. 1967). Dismissal is a remedy for improper venue (28 U.S.C. § 1406) which cannot seriously be contended in this action based on the federal securities laws. The mere choice of a plaintiff in a class action or a securities action to litigate in his home forum is not decisive. See, *e.g.*, *Garner* v. *Wolfinbarger*, 433 F.2d 117, 119 (5th Cir. 1970); *Schneider* v. *Sears*, *supra*, 265 F.Supp. at 266. Obviously, if the location of the Securities Exchange Commission were given substantial weight, the District of Columbia would be inundated with securities cases. Moreover, any paper filed with the Commission is readily available to plaintiff notwithstanding the transfer of the action to the Southern District of New

York. As is his custom, plaintiff has presented absolutely no authority in support of his plea for reversal of the denial of the retransfer motion. Again, Appellant has ignored the pendency of two related actions in the Southern District of New York, a clearly relevant factor supporting retention of this action there. *Schneider* v. *Sears*, *supra*, 265 F.Supp. at 266-67. (see page 12, *supra*).

Finally, as Judge Feinberg stated in *Farrell* v. *Wyatt*, *supra*, 408 F.2d at 664, "*we have apparently never reversed such an order [under §1404(a)] for abuse of discretion.*" This case hardly presents a precedent-setting situation.

V

CPC Is Entitled to Damages and Double Costs on this Frivolous Appeal

Federal Rule of Appellate Procedure 38 provides that if this Court determines that an appeal is frivolous, it may award just damages and single or double costs to the appellee. CPC submits that the conduct of this appeal in flagrant violation of the Rules of this Court and of the Federal Rules of Appellate Procedure are evidence of the necessity of such sanctions in the instant action. A simple —and necessarily short—perusal of Appellant's Brief gives an indisputable indication of the utter frivolity of the instant appeal.

As in this Court's recent opinion in *Acevedo* v. *Immigration and Naturalization Service*, —— F.2d ——, Slip. Op. No. 843 (2d Cir. Apr. 29, 1976) (per curiam):

> "The complete unsubstantiality of the petition indicates that it was not filed in good faith, but only as a tactic to delay further . . . Such abuse of the judicial process

> is always a matter of concern. . . . [W]e must be equally willing to employ lawful sanctions as a means of preventing needless waste of the court's time and resources."

As in the *Acevedo* case, double costs are appropriate herein, whether they be assessed against plaintiff or his counsel.

Moreover, the sheer frivolity of the appeal herein demands the award of attorneys' fees to CPC. This case bears similarity to *Oscar Gruss & Son* v. *Lumbermens Mutual Casualty Co.*, 422 F.2d 1278, 1284 (2d Cir. 1970), wherein this Court assessed double costs, additional interest and attorneys' fees, "[i]n view of the superfluity of issues on appeal, the frivolity of almost all of them, and the briefing of many in a manner that simply ignored the abundant evidence supporting the determination of the jury and the judge. . . ." Plaintiff herein did a thorough job of ignoring the abundant evidence supporting the District Court's rulings. Appellant's Brief contains not a single citation to the record or Appendix, in violation of Fed. R. App. P. 28(e). See also *Simon & Flynn, Inc.* v. *Time Inc.*, 513 F.2d 832, 835 (2d Cir. 1975); *Fluoro Electric Corp.* v. *Branford Assoc.*, 489 F.2d 320, 326 (2d Cir. 1973); *A/S Kredit Pank* v. *Chase Manhattan Bank*, 303 F.2d 648 (2d Cir. 1962).

Finally, the provisions and effects of Rule 38 are not new to plaintiff and his counsel. In *Furbee* v. *Vantage Press, Inc.*, 464 F.2d 835, 837 (D.C. Cir. 1972), attorneys' fees and costs were assessed against the client of Messrs. Brick and Intrater:

> "Moreover, we deem Furbee's appeal from the order of dismissal to be, in the circumstances, utterly without merit and frivolous. The federal case law supporting Vantage Press is unambiguous and unwaivering. Ap-

> pellant was made fully aware of the cases Appellee chiefly relied on in a memorandum in support of defendant's motion to dismiss, filed with the District Court and reprinted in Appellant's brief. We find nothing in Appellant's argument on appeal which casts the remotest doubt on those cases. Notwithstanding the clear state of the law, Furbee pressed his appeal, involving Vantage Press in the inconvenience and expense of employing counsel to resist the appeal. Appellate courts are burdened by a heavy volume of business and the problem is needlessly aggravated when frivolous appeals are taken. Justice, we think, requires that the costs of this appeal, including the expense of printing Appellee's brief, and reimbursement for reasonable attorney's fees be awarded to Vantage Press."

CPC submits that the aggravated nature of the plaintiff's conduct of this appeal in derogation of numerous Federal Rules,* as well as the utter lack of support for this appeal, mandate the award of attorneys' fees and double costs to CPC.

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* Plaintiff is in apparent violation of the following Federal Rules of Appellate Procedure: 7—as of June 22, 1976, the record in this action did not reflect that plaintiff had filed the mandatory bond for costs on appeal (this violation of the Rule is also in violation of Judge Van Graafeiland's Order of June 11, 1976, ordering the filing of the mandatory bond); 28(a)(4), (d), (e)—Appellant's Brief contains no citations to parts of the record relied on; 30(a), (b), (d)—the contents and arrangement of the Appendix filed by plaintiff were not designated or agreed upon and are not in compliance with the various requirements as set out in CPC's motion for leave to file supplemental appendix which was granted on June 11, 1976; and 32(a) (5)—the name of counsel for CPC was put on plaintiff's Appendix without authorization. Plaintiff is also in apparent violation of Rule 28 of this Court in that Appellant's Brief contains irrelevant and immaterial matter.

CONCLUSION

CPC respectfully submits that, in the event this Court accepts jurisdiction of this appeal, or any part of it, the District Court's rulings should be, in all respects, affirmed. In addition, attorney's fees and double costs should be awarded to CPC.

Respectfully submitted,

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ADA MELOY

Dated: New York, New York
June 24, 1976

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- -x

ALBERT BRICK, :

Plaintiff-Appellant, :

-against- : No. 76-7143

CPC INTERNATIONAL INC., : CERTIFICATE OF SERVICE

Defendant-Appellee. :

- -x

I do hereby certify that two copies of the annexed Brief for Appellee and one copy of the annexed Supplemental Appendix were served on counsel for plaintiff-appellant by depositing the copies in a postage-paid envelope in a

addressed to:

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Sworn to before me at New York
New York this 24th day of June 1976

Robert R Cawthra II.

ROBERT R. CAWTHRA, JR.
Notary Public, State of New York
No. 31-0605710
Qualified in New York County